Nos. 78-144 and 78-5156

In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD STEVEN MENDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ELIZABETH REEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B)[1] is reported at 578 F.2d 668. The opinions of the district court granting petitioners' suppression motion and denying the government's motion for reconsideration (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. A petition for rehearing was denied on June 28, 1978. The petition for a writ of certiorari in No. 78-144 was filed on July 26, 1978, and the petition in No. 78-5156 was filed on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirements of Fed. R. Crim. P. 41(c)(1) concerning the issuance of a search warrant upon affidavit are satisfied where the facts establishing probable cause are set forth in oral recorded testimony under oath before the issuing magistrate and that testimony is incorporated by reference into the affidavit.

2. Whether, assuming that the procedures employed here did not satisfy Rule 41(c)(1), the evidence seized pursuant to the search warrant should have been suppressed.

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[1] "Pet. App." refers to the appendix in No. 78-5156.

RULE INVOLVED

At the time the warrant in this case was issued, Fed. R. Crim. P. 41(c)(1) provided in pertinent part:[2]

> A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. * * * The warrant shall be served in the daytime, unless the

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[2] The warrant in this case was issued on September 28, 1976. Although both petitioners and the courts below refer to former Rule 41(c) as being in effect on that date, Rule 41(c) became Rule 41(c)(1) effective August 1, 1976. See Pub. L. No. 94-349, Section 1, 90 Stat. 822. However, new subdivision (c)(2), which permits a magistrate to issue a warrant based upon telephone communications, did not become effective until October 1, 1977. At that time, the language of Rule 41(c)(1) was amended to include its present reference to the oral testimony provision of Rule 41(c)(2). See Pub. L. No. 95-78, Section 2(e), 91 Stat. 320.

issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. * * *

STATEMENT

On November 23, 1976, an indictment was returned by a grand jury of the United States District Court for the Northern District of Illinois charging petitioners and co-defendant Kerry Gress with conspiracy to manufacture and manufacture of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). In addition, petitioner Mendel was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and petitioner Reeves was charged with possession of methamphetamine, in violation of 21 U.S.C. 844.[3]

Following their indictment, petitioners moved to suppress evidence that had been seized pursuant to a search warrant, alleging that the affidavit in support of the warrant was insufficient under Rule 41(c), Fed. R. Crim. P. The district court granted their motion and suppressed the evidence (Pet. App. A).[4]

[3] A superseding indictment returned on December 28, 1976, contains no differences from the original indictment that are material to the disposition of this petition.

[4] The order of the district court suppressing the evidence was entered on March 4, 1977. The government sought reconsideration on the grounds, *inter alia*, that exigent circumstances would have justified a warrantless search and that petitioners lacked standing to challenge the search warrant. The district court rejected both of these claims in its order of September 29, 1977, denying the government's motion for reconsideration, and the government did not challenge these rulings on appeal.

The government appealed, and the court of appeals reversed and remanded the case for trial (Pet. App. B).

The facts surrounding the issuance of the search warrant are set forth in the court of appeals' opinion (Pet. App. B 2-3).[5] For approximately one week prior to September 28, 1976, agents of the Drug Enforcement Administration conducted an investigation that led them to believe that a coach house at 1910 North Mohawk Street, Chicago, Illinois, was being used for the unlawful manufacture of methamphetamine. The agents began continuous surveillance of the coach house on the morning of September 28, and by 3:20 p.m. they concluded that they had probable cause to obtain a search warrant. The agents' belief was based on their knowledge that quantities of chemicals used in manufacturing methamphetamine had been brought to the coach house and on their detection of an ether odor emanating from the premises. The ether odor indicated that the manufacturing process had entered its final stages and that a search would have to be made promptly to obtain evidence of manufacture.

At about 4:30 p.m. DEA agents arrived at the United States Attorney's office to seek assistance in

[5] The district court did not hold a suppression hearing. The facts recounted by the court of appeals are based on testimony given in the October 6, 1976, preliminary hearing following petitioners' arrest and in hearings held on May 24 and June 2, 1977, in which the government attempted to establish the existence of exigent circumstances for the search.

obtaining a search warrant. An Assistant United States Attorney prepared an affidavit to be executed by Agent Richard Ripley, using a printed form entitled "Affidavit for Search Warrant." The premises to be searched, the crime suspected of being committed, and the evidence of the crime believed to be present on the premises were all carefully described in this affidavit. After the printed phrase, "the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows," the words "(SEE ATTACHED AFFIDAVIT)" were typed but were then crossed out by hand. In their place, the words "Tape to be typed later and attached" were written (Pet. App. F).

At 9:00 that evening, the Assistant United States Attorney, Agent Ripley, another DEA agent, and a DEA chemist took the unsigned affidavit, a typed warrant and a tape recorder to the home of a federal magistrate. With the tape recorder running, Agent Ripley was sworn and proceeded to state in detail the facts tending to establish probable cause. Both the Assistant United States Attorney and the magistrate interrupted his statement several times with questions. At the conclusion of Agent Ripley's testimony, the magistrate announced that he was satisfied that probable cause existed and would issue the warrant. The time was stated to be 9:24 p.m.

The recorder was then turned off, but it was turned on again within a minute to record a discussion of when the search would be conducted. After hearing why there was good reason to delay the search until

after petitioners had returned to the coach house,[6] the magistrate announced that he would authorize a search after 10 p.m., so long as it was conducted within one hour after petiitoners had returned.

Agent Ripley signed the affidavit form under oath, and the magistrate issued the search warrant. DEA agents executed the warrant that night and found substantial amounts of methamphetamine, chemical manufacturing apparatus, and other miscellaneous evidence of criminal activity. Subsequently, the tape recorded proceedings were transcribed, the magistrate certified to the accuracy of the transcript, and the certified transcript was attached to the affidavit.

RGUMENT

Even if petitioners' claims would otherwise merit review, this Court should not now consider their challenge to the decision of the court of appeals. The ruling below places petitioners in precisely the same procedural position they would have occupied if the district court had denied their motion to suppress. That ruling could not have been reviewed before trial (*United States* v. *MacDonald*, No. 75-1892 (May 1, 1978), slip op. 11, n.7; *Abney* v. *United States*, 431 U.S. 651, 659, 663 (1977); *Cogen* v. *United States*,

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[6] One of the agents informed the magistrate that petitioners and the other individual apparently involved in the manufacturing process had left the coach house and might not return by 10 p.m. The agent explained that they preferred to have one of these persons present during the search because interruption of the manufacturing process creates a risk of explosion (Pet. App. B 3 n.2).

278 U.S. 221, 227 (1929)), and the same considerations that counsel against interlocutory appeals of denials of suppression motions also weigh against review of the suppression issue by this Court at this stage of the proceedings. Petitioners were indicted almost two years ago and have not yet been tried. At trial they may be acquitted, in which event their claims will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present all of their contentions to this Court by seeking review of the final judgment.

In any event, petitioners' claims are unpersuasive:

1. Petitioners contend that the evidence seized in the search should be suppressed because Agent Ripley's sworn statement of probable cause was not set forth in the written affidavit submitted to the magistrate. They argue that the procedure followed here did not comply with Fed. R. Crim. P. 41(c)(1), which provides in part that "[a] warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate * * * and establishing the grounds for issuing the warrant." The court of appeals properly concluded that petitioners' interpretation of Rule 41(c)(1) was unduly narrow and that "the recording of the sworn statement made before the magistrate was properly incorporated by reference into the affidavit and made a part of it" (Pet. App. B 4).

At base, petitioners' argument rests entirely on the claim that the term "affidavit" as used in Rule 41

(c)(1) refers only to the written document submitted to the magistrate. But Rule 41(c)(1) itself provides explicit authority for considering oral recorded testimony made under oath before the magistrate as part of the "affidavit" required by the rule. Rule 41(c) was amended in 1972 to provide that the magistrate may examine the affiant under oath and that "such proceeding shall be taken down by a court reporter or recording equipment *and made part of the affidavit*" (emphasis added). This provision makes clear that in determining whether an affidavit established sufficient grounds for issuing a warrant, the written document submitted to the magistrate is to be considered together with any recorded sworn testimony given before him.[7] Since it is undisputed that the written document and oral proceedings in this case, taken together, "showed probable cause beyond ques-

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[7] Prior to the 1972 amendment, there was a conflict among the circuits as to whether facts adduced in sworn oral testimony before the magistrate but not set out in the written affidavit could be considered in determining the existence of probable cause. Compare *United States* v. *Hill*, 500 F.2d 315, 320-321 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975), and *Leeper* v. *United States*, 446 F.2d 281, 285 (10th Cir. 1971), cert. denied, 404 U.S. 1021 (1972), with *United States* v. *Anderson*, 453 F.2d 174, 177 & n.3 (9th Cir. 1971). The Advisory Committee Notes to the 1972 amendment state that the provision for recording oral testimony and making it part of the affidavit was included "to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise" (56 F.R.D. 143, 169).

tion" (Pet. App. B 9), the affidavit requirement of Rule 41(c)(1) was satisfied.[8]

Although petitioners contend that the 1972 amendment was designed to permit only oral supplementation of a written statement of probable cause, it is their construction of the rule, not that of the court of appeals, that exalts form over substance. Contrary to petitioners' assertion that a written statement of probable cause is needed to insure careful decision by the magistrate, the law generally prefers spontaneous oral testimony, subject to immediate examination, to a written document, especially one that generally is not prepared by the affiant. As the court of appeals observed (Pet. App. B 8), "[o]ral testimony before the magistrate will often be more likely than an affidavit to assure that the magistrate will make an independent judgment based on the facts and not rely on the mere conclusions of the officer." Moreover, the procedure followed here was fully consistent with the two-fold purpose of the affidavit requirement: to insure that the magistrate "may judge for himself the persuasiveness of the precise facts relied on to show probable cause" and to provide a record on which a court may review the sufficiency of the facts presented to the magistrate. *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971).

In short, no logical purpose would be served by concluding that Rule 41(c)(1) is satisfied if some

[8] The document submitted to the magistrate was not merely "a few written words" (Reeves Pet. 9). It contained information vital to a valid affidavit—a particular description of the place to be searched and the items to be seized.

written statement of probable cause is made—even though crucial elements are supplied only by oral testimony—but violated if no facts appear in writing. The court of appeals correctly reasoned that whether oral testimony before the magistrate supplements a written statement or provides the entire basis for determining the existence of probable cause, "the rule contemplates that in either case the recording, when incorporated by reference, is to be considered a part of the affidavit" (Pet. App. B 6).

The decision below is not inconsistent with the 1977 amendments to Rule 41(c). New subdivision (c)(2) added by those amendments, although broadly captioned "Warrant Upon Oral Testimony," concerns warrants upon sworn oral testimony of a person who is not in the physical presence of a magistrate, primarily warrants issued following telephone conversations.[9] The fact that telephonic search warrants were authorized in 1977, however, hardly indicates that oral testimony before the magistrate was previously improper, particularly in view of Rule 41(c)(1)'s explicit provision for such testimony. Personal appearance affords a crucial opportunity for the evaluation of demeanor evidence that is absent in the tele-

[9] Rule 41(c)(2)(A) provides that "[i]f the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." Subsequent provisions of subdivision (c)(2) set out procedures for preparing a "duplicate original warrant" and an "original warrant," placing the applicant-"caller" under oath, and recording or transcribing the call.

phonic procedure; despite this drawback the telephonic procedure was approved.[10]

Finally, petitioner Reeves' suggestion (Pet. 15-17) that the decision below would permit the government to circumvent the strict recordation requirements of Rule 41(c)(2)(D) is insubstantial.[11] To begin with, Rule 41(c)(1) contains its own recordation requirement. But more important, since the telephonic procedure was designed to permit agents to obtain a warrant where personal appearance before the magistrate is impractical, it is exceedingly unlikely that agents would appear solely to avoid a requirement that "all of the call" be recorded. In any event, any preference for personal appearances rather than telephonic communications that did develop would seem

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[10] Concern over the absence of a personal appearance before the magistrate obviously formed much of the basis of Representative Holtzman's reservations about the telephonic procedure, cited by petitioner Reeves (Reeves Pet. 14-15).

[11] Subdivision (c)(2)(D) provides in part that "[i]f a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant." Petitioner Reeves contends that, in view of this provision, even if the oral procedure employed here was otherwise permissible the warrant should be voided because the tape was interrupted. As the court of appeals noted (Pet. App. B 9), however, subdivision (c)(2)(D) is inapplicable in this case. Moreover, it is doubtful that this provision would be considered violated even if applicable, since the interruption complained of lasted less than one minute and occurred after the magistrate had determined that the warrant should issue.

beneficial, since the former procedure is undeniably the more desirable.[12]

2a. Even assuming that the procedure employed here did not comply with Rule 41(c)(1), it does not follow that the evidence seized in the search should be suppressed. This case clearly involves no violation of petitioners' constitutional rights, since the Fourth Amendment does not require that a sworn statement in support of a search warrant be reduced to writing.[13] What occurred was at most an unintentional violation of Rule 41's procedural requirements, which did not prejudice petitioners in any respect. In these circumstances, the court of appeals correctly concluded that application of the exclusionary rule would not be proper regardless of whether the warrant application failed to comply fully with Rule 41 (Pet. App. B 9-11).

This Court has noted that "[a]s with any remedial device, the application of the [exclusionary] rule has

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[12] Petitioner Mendel also suggests (Pet. 11-12) that, since Rule 41(c)(2)(A) permits telephonic warrants where "circumstances make it reasonable to dispense with a written affidavit," this Court should consider whether there were sufficient reasons to justify oral testimony in this case. Apart from the fact that the 1977 amendments are not applicable here, this argument ignores Rule 41(c)(2)(G), which provides that a suppression motion may not be based on the ground that "circumstances were not such as to make it reasonable to dispense with a written affidavit."

[13] See, *e.g.*, *United States* v. *Turner*, 558 F.2d 46, 50 (2d Cir. 1977); *United States* v. *Hill*, *supra*, 500 F.2d at 321; *Gaugler* v. *Brierley*, 477 F.2d 516, 522 (3d Cir. 1973); *Sherrick* v. *Eyman*, 389 F.2d 648, 652 (9th Cir.), cert. denied, 393 U.S. 874 (1968).

been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Accordingly, the courts have generally been unwilling to extend the severe remedy of suppression, with its consequent impairment of the truth-finding process, to cases involving only technical or ministerial violations of Rule 41 that do not implicate any substantial rights.[14] As Judge Friendly has observed, "violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *United States* v. *Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975) (footnotes omitted). The Second Circuit has applied the *Burke* test in re-

[14] See, *e.g.*, *United States* v. *Garrett*, 565 F.2d 1065, 1071 (9th Cir. 1977), cert. denied, No. 77-6178 (Apr. 17, 1978) (failure of warrant to name magistrate to whom return was to be made and agent's failure to make prompt return did not require suppression); *United States* v. *Burgard*, 551 F.2d 190, 193 (8th Cir. 1977) (error in making return to state court judge rather than federal magistrate did not make suppression of the evidence appropriate); *United States* v. *Dauphinee*, 538 F.2d 1, 3 (1st Cir. 1976) (failure of agent to inventory a seized revolver did not require its exclusion); *United States* v. *Hall*, 505 F.2d 961, 964 (3d Cir. 1974) (failure of agent to file inventory promptly did not warrant suppression). But see *United States* v. *Hittle*, 575 F.2d 799 (10th Cir. 1978), affirming the suppression of evidence because of the failure of a state judge to record sworn, oral testimony supplementing a search warrant affidavit, without any discussion of the propriety of applying the exclusionary rule.

fusing to suppress evidence in circumstances analogous to this case. In *United States* v. *Turner*, 558 F.2d 46, 51-53 (2d Cir. 1977), the court assumed that the issuance of a warrant on telephonic communications prior to the 1977 amendments violated Rule 41(c), but it nonetheless concluded that the error did not require application of the exclusionary rule.[15]

Here, as in *Turner*, there is no indication of any intentional disregard of Rule 41. Government agents merely followed what they believed to be a permissible procedure for obtaining a warrant, and the reasonableness of their belief can hardly be questioned in light of the court of appeals' conclusion that they had been correct.[16] Nor did the claimed violation of the rule result in any conceivable prejudice to petitioners, since "it is clear that the warrant would have been properly issued if the facts stated orally had been set forth in the text of the affidavit" (Pet.

[15] Although *Turner* involved a state search warrant issued to state and federal law enforcement officers in a state that did permit a telephonic warrant procedure, the court concluded that the warrant had to be tested in light of Rule 41 because of the federal involvement in the search. 558 F.2d at 49.

[16] In ordering suppression, the district court distinguished *Turner* on the grounds that this case involved federal agents who knew they were acting under federal rules; it charged them with knowledge of the requirements of Rule 41 and viewed their good faith as irrelevant (Pet. App. A 4). But an "absolute liability" standard, even for federal agents acting under federal rules, does not advance the purposes of the exclusionary rule and ignores the admonition in Rule 52(a) that "[a]ny error * * * which does not affect substantial rights shall be disregarded."

App. B 10). Finally, petitioners were "not deprived of any substantial procedural safeguard provided for in Rule 41." *United States* v. *Turner*, *supra*, 558 F.2d at 53. As noted earlier, the agent's in-person oral testimony was, if anything, more conducive to an independent evaluation of probable cause by the magistrate than the mere submission of a written statement. In addition, "[t]he facts relied on to make up probable cause have been preserved both on tape and in written form, and they were supplied by witnesses whose identities are known and who were under oath." *Ibid.*

Thus, no deterrent or other remedial purpose would be served by suppressing the evidence seized in the search. Notably, the 1977 amendments to Rule 41(c) specifically provide that use of the telephonic rather than affidavit procedure shall not be grounds for suppressing evidence obtained pursuant to an otherwise valid warrant. Fed. R. Crim. P. 41(c)(2)(G). Although not applicable in this case, this provision is further proof that the oral testimony procedure followed here was at most a technical violation of Rule 41, for which the drastic sanction of the exclusionary rule would not be appropriate.

b. The above analysis is equally applicable to petitioner Mendel's additional claim (Mendel Pet. 13-14) that the evidence should be suppressed because the magistrate did not make a notation on the warrant authorizing its execution after 10 p.m., as required by Rule 41(c)(1). It is undisputed that the magistrate had sufficient reason to authorize the nighttime

search, and both the justification for the late search and the authorization appear on the transcribed tape of the proceedings before the magistrate. In these circumstances, the technical violation of the rule does not warrant suppression.[17]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[17] Petitioner Reeves appears to suggest that the evidence should also be suppressed because the warrant, even if valid, was executed with excessive force (Reeves Pet. 18). As she notes, this claim was not addressed by either the district court or the court of appeals, and understandably so; on appeal, for example, petitioner's sole reference to this issue appears to have been limited to a footnote in her brief suggesting, *inter alia*, that she was arrested without probable cause.

In any event, her claim is without merit. The record indicates that the warrant was executed by three or four DEA agents who approached petitioners' car with drawn weapons, identified themselves, and asked the three occupants to leave the vehicle. Subsequently, when refused keys to the coach house, one of the agents kicked in the door to gain entry for the search (May 24, 1977, Tr. 34-35, 58-62).

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